

APPEAL NO. 010831
FILED JUNE 6, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on March 23, 2001. The hearing officer resolved the disputed issues by concluding that the respondent (claimant) is not entitled to supplemental income benefits (SIBs) for the eighth and ninth quarters, and that the appellant (carrier) is not entitled to a reduction of the claimant's impairment income benefits (IIBs) and SIBs based on contribution from an earlier compensable injury. The carrier has appealed, asserting that the hearing officer erred in resolving the contribution issue because he erroneously interpreted the law and applied an incorrect method in resolving the issue against the carrier. The file does not contain a response from the claimant.

DECISION

Reversed and remanded.

The hearing officer's findings and conclusions relating to the SIBs issues have not been appealed and have thus become final. Section 410.169.

The parties stipulated that the claimant sustained a compensable injury on _____. Not appealed are findings that the claimant sustained a compensable injury to her low back prior to her compensable injury of _____, and that she was not compensated in terms of SIBs for the prior injury.

The claimant testified that her _____, compensable injury was to her low back; that she thereafter received some IIBs, returned to work, and did not receive SIBs; and that her subsequent injury was to both her neck and her low back. On March 24, 2000, the carrier filed a Carrier's Request for Reduction of Income Benefits Due to Contribution (TWCC-33), which requests a 100% reduction in IIBs and SIBs for the effects of contribution from the prior compensable injury. The TWCC-33 also states that the claimant received an impairment rating (IR) of 18% for the 1993 injury and that the body parts involved were her "neck [and] back" and that she received a 19% IR for the current compensable injury which also involved the claimant's "neck [and] back." However, the October 14, 1994, report of Dr. O, the designated doctor, reflects that his 18% IR for the earlier injury consisted of 12% for abnormal range of motion (ROM) in the lumbar spine and 7% for the claimant's unoperated herniated disc at the L5-S1 level. The January 27, 1998, report of Dr. E, who assigned the claimant a 19% IR, reflects that this rating consisted of 11% for the specific disorder of the cervical spine, 9% for abnormal ROM of the cervical spine, 7% for the specific disorder of the lumbar spine, and 6% for abnormal ROM of the lumbar spine. According to Dr. E, the combination of the regional totals, 15% for the cervical spine and 10% for the lumbar spine, amount to the whole body 19% IR.

The claimant contended that the carrier was not entitled to any contribution for the earlier injury because her current injury was to both the cervical spine and lumbar spine, and because she had recovered from the earlier injury and returned to work without drawing SIBs. The carrier relied on the February 20, 2001, report of Dr. C, who contended that since the same area of the lumbar spine was rated for both abnormal ROM and for a specific disorder under Table 49 of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association for both injuries, "all of the currently assigned 10% impairment of the lumbar spine can be considered to be pre-existing and contributed from her earlier injury," and that the percent of contribution to the 19% IR from the earlier lumbar spine injury should be 53%.

Section 408.084 provides, in part, that the Texas Workers' Compensation Commission (Commission) may order that IIBs and SIBs be reduced in a proportion equal to the proportion of a documented impairment that results from earlier compensable injuries and that the Commission shall consider the cumulative impact of the compensable injuries on the employee's overall impairment in determining a reduction. Whether or not the carrier is entitled to contribution from the earlier injury is a question of fact for the hearing officer to decide and the burden of proof is on the carrier. Texas Workers' Compensation Commission Appeal No. 94366, decided May 11, 1994.

In the only finding on the contribution issue (Finding of Fact No. 13), the hearing officer found that "[t]he claimant was not compensated in terms of [SIBs] for the prior injury." Based on this finding, the hearing officer concluded that the carrier is not entitled to a reduction of the claimant's IIBs and SIBs based on contribution from an earlier compensable injury. The hearing officer's discussion of the evidence did state that "the inquiry is to determine what proportion of the present injury is one for which the claimant has already been compensated; the 'cumulative impact' element is used to determine the correct proportions." However, the hearing officer goes on to state that "[i]n this case, it is clear that in terms of SIBs, none of the prior injury has been 'compensated' and the carrier is thus not entitled to any 'contribution' from that injury." He also noted that no cervical injury was involved in the 1993 injury.

We are persuaded from the sole finding on contribution and from the hearing officer's discussion that he has resolved the contribution issue by misapprehension of Section 408.084; namely, that the carrier is not entitled to contribution because the claimant did not receive SIBs after the prior compensable injury. Whether or not the claimant received SIBs after the prior injury is not the proper inquiry. Rather, the inquiry should focus on the contribution, if any, that the claimant's impairment from the first injury made to her impairment from the second injury, the cumulative impact. See, e.g., Texas Workers' Compensation Commission Appeal No. 941405, decided December 1, 1994. See, also, Texas Workers' Compensation Commission Appeal No. 950268, decided April 10, 1995. Accordingly, the hearing officer's decision and order are reversed and the case is remanded for further consideration and findings based on the evidence of record and consistent with this opinion.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Philip F. O'Neill
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Michael B. McShane
Appeals Judge